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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 540

EASTERN AIR LINES, INC.,
Petitioner,

v.

DONALD A. SCOTT, Administrator of the Estate of THOMAS L. MOODY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the three-judge panel of the Court of Appeals reversing the judgment of the District Court is printed as Appendix A to the petition and reported in 399 F.2d at 16. The opinions on rehearing of the Court of Appeals *en banc* affirming the judgment of the District Court are printed as Appendix B to the petition and reported in 399 F.2d at 18.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court was filed on June 28, 1968, and the petition for a writ of certiorari was filed on September 18, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Should recovery for breach of contract, in a cause of action created by Pennsylvania law for compensatory damages resulting from the death of plaintiff's decedent, be denied solely because the breach involved the crash of defendant's land-based aircraft in navigable waters and not on land?

2. In choosing between conflicting state law to govern the measure of damages for a maritime tort resulting in death, should a court consider the relative interests of the jurisdictions having contacts with the controversy and the parties, or must the court apply only the substantive law of the place of the fatal impact?

COUNTER-STATEMENT OF THE CASE

The instant petition for certiorari is the most recent in the many attempts by the petitioner and defendant below, Eastern Air Lines, Inc. (herein sometimes referred to as "Eastern"), to avoid judgments for compensatory damages under Pennsylvania law for the deaths of twenty-two Pennsylvania residents who were killed, as the jury found, by the negligence of Eastern in an airplane crash on October 4, 1960.

The instant case was selected by the petitioner for an expedited appeal to determine the law applicable to the measure of damages in the twenty-two companion cases.

A. The facts concerning the instant decedent.

The Agreed Statement (Appendix D to the Petition, pp. 44a-49a) establishes the following:

Plaintiff's decedent, Thomas L. Moody, was a resident of Philadelphia, Pennsylvania, employed by Sears Roebuck & Co. with his office in Philadelphia.

The round-trip ticket on which Mr. Moody was traveling at the time of his death was issued in Philadelphia for a trip from Philadelphia to Boston, Massachusetts, on October 3, 1960 on Northeast Airlines and for a return trip from Boston to Philadelphia on October 4, 1960 on Eastern Air Lines Flight 375.

On October 4, 1960, Eastern Flight 375, carrying Mr. Moody on the ticket which he had been issued in Philadelphia, took off from Logan International Airport, Boston, with its first stop scheduled for Philadelphia. When in the air, the plane struck a flock of birds while still over land, and then crashed in navigable waters of Boston Harbor. Mr. Moody died instantaneously.

Decedent was unmarried and without children and was survived by a brother. His estate is being administered by the plaintiff, a resident of Philadelphia, under the jurisdiction of the Orphans' Court of Philadelphia County.

At his death, decedent had a lease on his apartment in Philadelphia and owned personal property situated in Pennsylvania. The debts of his estate were all owing to Pennsylvania creditors and substantial Pennsylvania inheritance taxes have been levied on the estate.

Following a consolidated trial on liability of the instant case and three others, the jury returned a verdict on liability in favor of plaintiff and against Eastern. That verdict is not disputed in this appeal.

Subsequently, the jury, after having been charged in accordance with Pennsylvania law, rendered a verdict under the Pennsylvania Wrongful Death Act for $2,500 as the reasonable funeral and administration expenses in-

curred by decedent's estate and $45,000 under the Pennsylvania Survival Act as the expectable value of his estate at the end of a normal lifetime. The details of the charge and the amount of the verdict are not disputed here. Petitioner seeks review only of the question of what law governs the measure of damages recoverable by the plaintiff. It is agreed that petitioner sufficiently preserved that issue by appropriate exceptions to the charge.

B. The significance of the prior litigation.

In *Weinstein* v. *Eastern Airlines, Inc.*, 203 F. Supp. 430 (E.D. Pa. 1962), *modified*, 316 F.2d 758 (3d Cir. 1963), *cert. denied*, 375 U.S. 940, the District Court accepted the argument of defendant Eastern that the location of the instant crash in navigable waters was not sufficient to create jurisdiction in admiralty of libels alleging claims in both tort and contract filed on behalf of seven of the twenty-two Pennsyvania residents who died in the crash. In the course of the appeal from that decision, defendant Eastern continued to argue that there was no admiralty jurisdiction and that, with respect to the contract claims, there was "no maritime contract involved between any of the libellants' decedents and any of the respondents." Brief for Appellees, p. 13, *Weinstein* v. *Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963). The Court of Appeals rejected the defendants' argument against admiralty jurisdiction of the claims sounding in tort, holding that a maritime location alone was sufficient, 316 F.2d at 766, but sustained the position of defendant Eastern with respect to the claims sounding in contract. In affirming the dismissal of the contract claims as being outside the admiralty jurisdiction, the court stated:

> "It is clear, we believe, that a contract or warranty relating to the airframe or power plant of a land-based aircraft and a *contract of carriage by air between two cities on the United States mainland are not maritime in substance*, nor are such contracts and

warranties made maritime by virtue of the fact that the aircraft in question flew briefly over navigable waters en route from Boston to Philadelphia." 316 F.2d at 766. (Emphasis added.)

This Court denied certiorari. 375 U.S. 940.

The defendants also sought to transfer all pending litigation to the District of Massachusetts for trial. The District Court granted a motion to transfer, *Popkin* v. *Eastern Air Lines, Inc.*, 204 F. Supp. 426 (E.D. Pa. 1962), but that order was later vacated, *Barrack* v. *Van Dusen*, 309 F.2d 953 (3d Cir. 1962), *cert. granted*, 372 U.S. 964. This Court recognized that the real basis of the litigation involving transfer lay in the substantial difference between the Pennsylvania and Massachusetts statutes with respect to the measure of damages allowed for negligence resulting in death. *Van Dusen* v. *Barrack*, 376 U.S. 612, 626-627. Massachusetts awards only punitive damages for wrongful death, limited at the time of the instant crash to a maximum of $20,000 and assessed with reference to the degree of culpability of the tort-feasor, rather than by the amount of damages suffered by the plaintiffs. 376 U.S. at 627. Pennsylvania awards damages on a compensatory principle and without an arbitrary limit. 376 U.S. at 627.

Defendant Eastern argued in this Court in the *Barrack* case that the difference between the substantive law of the two states was "irrelevant . . . because . . . Pennsylvania state courts, applying their own choice of law rules, would require that the Massachusetts Death Act be applied in its entirety . . . ." 376 U.S. at 628. This Court reversed the Court of Appeals and remanded for further consideration of the effect on the plaintiffs' substantive rights of a transfer to the District of Massachusetts in view of the uncertainty concerning the Pennsylvania choice of law rule applicable to the cases involving Pennsylvania decedents. 376 U.S. at 645-46.

During the course of the litigation involving transfer, the parties involved in the Boston crash litigation had

been engaged in a test of the Pennsylvania choice of law rule in *Griffith* v. *United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964). Counsel for both the instant parties participated on both sides of that appeal as *amici curiae* and that appeal itself was a test case to determine the law to govern the Pennsylvania cases arising from the Boston crash. See 416 Pa. at 6 n.2, 203 A.2d at 798 n.2.

The Supreme Court of Pennsylvania in the *Griffith* decision held, first, that under Pennsylvania law an action could properly be commenced "in assumpsit" under the Pennsylvania Survival Act for damages resulting from the death of a passenger in the crash of a commercial aircraft. The nature of the action is "breach of contract of nonnegligent carriage" and liability may be imposed only for injuries "resulting from negligent conduct." 416 Pa. at 8, 203 A.2d at 799.

Second, the Pennsylvania court overruled the *lex loci delicti* doctrine and adopted a choice of law rule which "gives to the place 'having the most interest in the problem' paramount control over the legal issues . . ." 416 Pa. at 22, 203 A.2d at 806.

Applying that choice of law rule announced in the *Griffith* decision to the facts of the instant case, the court below held in the instant case that the Pennsylvania courts would conclude that Massachusetts, the place of the impact, has only "nominal contacts with the transaction" (A. 14a, 399 F.2d at 22) and that the Pennsylvania measure of damages should govern because Pennsylvania "has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law" (A. 14a, 399 F.2d at 22).

Prior to the decision in the *Griffith* case, the defendants below, including the petitioner, had consistently argued that the instant case was a diversity action controlled by Pennsylvania choice of law rules, consistent with *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487.

After the decision in *Griffith*, the defendants shifted their position and relied instead on the fact that the plane had crashed in navigable waters.

C. The opinions of the Court of Appeals.

The three-judge panel of the Court of Appeals entirely disregarded plaintiff's cause of action sounding in contract under Pennsylvania law and considered the case as one involving only a maritime tort resulting in death. The panel stated that the federal courts have "adhered to the simple rule of borrowing in their entirety the wrongful death and survival rules of the state within whose boundaries the maritime tort occurred" (A. 4a, 399 F.2d at 18), and applied that "simple rule" to hold that plaintiff's damages were measured exclusively by Massachusetts law.

On rehearing, the Court of Appeals *en banc* in an opinion by Judge Staley held that the plaintiff had stated and proven a claim under Pennsylvania law for breach of contract of nonnegligent carriage between plaintiff's decedent and Eastern, that the contract involved was nonmaritime in nature, as previously held in the *Weinstein* case (A. 9a-12a, 399 F.2d at 20-22), and that the Pennsylvania courts would apply in this case the measure of damages provided by Pennsylvania law, since Pennsylvania is the jurisdiction having the most significant interest in that issue (A. 13a-15a, 399 F.2d at 22-23).

With respect to the maritime tort aspect of plaintiff's case, the opinion held that "separate and independent" of the "contractual diversity claims," the District Court correctly applied Pennsylvania law to the tort claims (A. 19a, 399 F.2d at 25). The Court of Appeals noted that in no previous case had the court considered the question of whether any state law other than that of the place of the injury might govern the rights and duties of the parties, and that the guides for the disposition of that question should be found in the decisions in *Lauritzen* v. *Larsen*,

345 U.S. 571, and *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (A. 20a-25a, 399 F.2d at 26-28). Applying the choice of law principles found in those cases, the court concluded that the place of the wrongful impact was "quite adventitious" and that the most significant relations and contacts were with Pennsylvania rather than with Massachusetts (A. 25a, 399 F.2d at 28). The Court noted further that *Lauritzen* and *Romero* "were in the vanguard of many recent enlightened decisions attacking the usefulness and justice of rigid adherence to the strict *lex loci delicti* rule" (A. 25a-27a, 399 F.2d at 28-29).

Judge Freedman, in a concurring opinion, joined in the affirmance of the District Court, stating that under either the Pennsylvania or the maritime choice of law rules, "the award of damages was properly made under Pennsylvania's wrongful death and survival statutes" (A. 29a, 399 F.2d at 30).

Judge Seitz concurred in holding that the plaintiff might elect to pursue his rights under Pennsylvania law, but expressly reserved decision on what state law would be "borrowed" in the event that maritime law "was deemed controlling" (A. 33a, 399 F.2d at 32).

Three judges, two of whom had been part of the original three-judge panel, adhered to the position that the case involved solely a maritime tort to be decided by the simple rule of borrowing the substantive law of the place of the wrongful impact (A. 33a-40a, 399 F.2d at 32-35).

REASONS FOR REFUSING THE WRIT

I. THE DECISION BELOW IS CORRECT.

In the court below, the petitioner argued that the modern choice of law rule articulated in *Lauritzen* v. *Larsen*, 345 U.S. 571, and *Griffith* v. *United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964), would not result in the selection of Pennsylvania law to govern the measure of damages recoverable by the respondent, even if that rule was applicable to the instant case. Petitioner has now abandoned that argument and impliedly concedes that if the modern choice of law rule does govern the selection of the substantive state law of damages in the instant case, then that rule was correctly applied to the particular facts by the court below.

Petitioner also concedes that if the court below was correct in giving effect to respondent's state-created cause of action for breach of contract, then the choice of law rule to govern that state-created claim is the modern rule declared in the *Griffith* decision.

The issues on which petitioner seeks review, therefore, are (1) whether the court below was correct in giving effect to respondent's state-created claim, and (2) whether the choice of law rule applicable to the maritime tort claim is the modern rule of *Lauritzen* v. *Larsen* and *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, or the traditional rule of *lex loci delicti*.

A. Recognition in a death case of a state-created claim for breach of contract is consistent with the general maritime law when both the contract and the activities of the parties are nonmaritime and the only maritime interest arises from the fortuitous location of the place of impact.

The majority opinion below held that the plaintiff had adequately pleaded and proved a cause of action

under Pennsylvania law for breach of contract of non-negligent carriage, as recognized in *Griffith* v. *United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964). The opinion states that the plaintiff "did all that was required of him . . . ."

> "He alleged the breach of contract, he introduced into evidence the airplane ticket purchased by decedent in Philadelphia, and he proved that the negligent breach of Eastern's implied promise constituted a proximate cause of decedent's death. Nothing else need have been done." (A. 11a, 399 F.2d at 21).

The majority below further held that plaintiff's state-created claim was effective under both the Wrongful Death Act and the Survival Act of Pennsylvania (A. 15a-18a, 399 F.2d at 23-24).

Petitioner disagrees with the conclusion of the majority that plaintiff proved a contractual cause of action and argues to the contrary that "nothing in the Agreed Statement" can support the "finding that the case was tried or submitted to the jury on a theory of breach of contract" (Pet. 9). But review should be denied on this issue because petitioner's basic disagreement with the majority below involves nothing more than the quantum of evidence necessary to prove plaintiff's cause of action under Pennsylvania law. As stated in *Huddleston* v. *Dwyer*, 322 U.S. 232, 237, "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."

Nor is review justified on the argument made by the dissent below (A. 34a-36a, 399 F.2d at 32-33) that no state-related claim for breach of contract should be permitted in any case which also involves a maritime tort.

The majority opinion relies upon the holding in *Weinstein* v. *Eastern Airlines, Inc.*, 316 F.2d 758, 766

(3d Cir. 1963), *cert. denied,* 375 U.S. 940. The instant petitioner there argued, and the Court of Appeals held, that the contract claims asserted on behalf of other passengers killed in the instant crash were nonmaritime in nature. This Court has long held that admiralty jurisdiction "in matters of contract, depends upon the nature and character of the contract . . . ." *Philadelphia, W. & B.R.R.* v. *Philadelphia & Havre de Grace Steam Towboat Co.,* 23 How. 209, 215. Under that test, the Court of Appeals correctly held, both in 1963 in the *Weinstein* case and in the instant case, that "a contract of carriage by air between two cities on the United States mainland [is] not maritime in substance, nor are such contracts . . . made maritime by virtue of the fact that the aircraft in question flew briefly over navigable waters en route from Boston to Philadelphia." 316 F.2d at 766, quoted, 399 F.2d at 21-22.

Neither the petitioner nor the dissent have shown any maritime or federal interest which is infringed by recognition of plaintiff's nonmaritime and state-created contract claim. The petition asserts that the "decision of the court below stands in bold conflict" with eight prior decisions (Pet. 9-10), but each of those decisions involved an activity which was entirely maritime in nature, *i.e., The Tungus* v. *Skovgaard,* 358 U.S. 588 (fatal injury aboard ship while repairing pump used to discharge cargo); *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406 (injury to carpenter aboard ship in navigable waters while facilitating loading of cargo for "safer transportation . . . by water"); *Whorton* v. *T. A. Loving & Co.,* 344 F.2d 739 (4th Cir. 1965) (negligent failure to remove obstruction from navigable waterway resulting in sinking of boat); *Larios* v. *Victory Carriers, Inc.,* 316 F.2d 63 (2d Cir. 1963) (seaman's claim for injury resulting from collision on high seas); *J. B. Effenson Co.* v. *Three Bays Corp.,* 238 F.2d 611 (5th Cir. 1956) (maritime charter); *Roth* v. *Cox,* 210 F.2d 76 (5th Cir. 1954), *aff'd,* 348 U.S. 207

(Jones Act claim for death of seaman on high seas); *Jansson* v. *Swedish American Line*, 185 F.2d 212 (1st Cir. 1950) (injury to passenger from fall aboard motor vessel; interpretation of maritime contract of carriage on motor vessel between Sweden and United States); *Massaro* v. *United State Lines Co.*, 307 F.2d 299 (3d Cir. 1962) (injury to longshoreman while aboard ship to discharge cargo).

Since the activity involved in each of those cases was held to be entirely maritime in nature, maritime law was properly applied to govern all rights and obligations of the parties.

The instant case requires a different result because the activity involved is nonmaritime, consisting of the carriage of passengers by air in a land-based aircraft between two points on the mainland of the United States, and a maritime interest is created with respect to the tort claims only because of the fortuitous location of the place of impact. If that maritime interest is recognized with respect to all tort claims arising from the crash, as in the instant case, no valid maritime or federal interest is infringed by also giving effect to the legitimate and substantial interest of Pennsylvania in recognizing and enforcing a cause of action for breach of contract by Pennsylvania domiciliaries who purchase tickets in Pennsylvania for commercial air service. Pennsylvania's interest in assuring adequate compensation under Pennsylvania standards for the breach of such contracts is the same in cases involving deaths on land and deaths on navigable waters.

Since the state-created cause of action recognized by the majority below is only supplemental to, and not exclusive of, the maritime cause of action, the instant decision is well within the limits of the decisions which have determined the extent to which nonmaritime and state-created causes of action can not only supplement, but also entirely abrogate, maritime causes of action

resulting from crashes of aircraft into navigable waters. Two such decisions have held that state workmen's compensation acts exclude a maritime recovery for the deaths of airline personnel resulting from crashes into navigable waters. In *King* v. *Pan American World Airways,* 166 F. Supp. 136 (N.D. Cal. 1958), *aff'd,* 270 F.2d 355 (9th Cir. 1959), *cert. denied,* 362 U.S. 928, recovery was denied under the Death on the High Seas Act for the death of an airline employee who was killed in the crash of an airliner on the high seas in a flight between the United States and Hawaii, on the ground that the California Workman's Compensation Act afforded the exclusive remedy against the decedent's employer. In reaching this result, both courts considered first whether recognition of the Workman's Compensation Act in such a case would cause "material prejudice to the characteristic features of the general maritime law," within the meaning of *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 216, and similar cases. Both courts held that such "material prejudice" would not result because the decedent "was employed in a nonmaritime industry and performed no maritime work," 270 F.2d at 362; 166 F. Supp. at 139. Both courts also held that Congress did not intend to abrogate workman's compensation acts through the enactment of the Death on the High Seas Act. The *King* case was followed in *Hudson* v. *Transocean Air Lines,* 272 F.2d 397 (9th Cir. 1959).

The reasoning of the *King* and *Hudson* decisions applies *a fortiori* to the instant case. Neither the petitioner nor the plaintiff's decedent was engaged in any maritime activity at the time of the crash. Only the fortuitous location of that crash creates any maritime interest. Recognition under such circumstances of a state-created cause of action, which is not exclusive of martime rights and remedies, does not work any "material prejudice to the characteristic features of the general maritime law."

B. Selection between conflicting state law to govern a maritime tort resulting in death must be made by evaluation of all points of contact with the parties and the transaction, not by a mechanical rule of choosing the law of the place of impact.

The decision of the court below to select the substantive law applicable to the damages issue by evaluation of the relative interests of the jurisdictions having contacts with the controversy and the parties was entirely consistent with the decisions of this Court.

In *Lauritzen* v. *Larsen,* 345 U.S. 571 (1953), a suit for damages under the Jones Act, this Court expressly rejected the law of the place of the injury, Cuba, stating that "the test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts . . ." 345 U.S. at 583. The Court then considered at length seven "factors" or "points of contact" which should be used to determine the choice of law to govern a tort claim, "particularly a maritime tort claim . . ." 345 at 583, and held that Danish law governed.

In *Romero* v. *International Terminal Operating Co.,* 358 U.S. 354 (1959), a seaman on a Spanish vessel was injured while the vessel was temporarily berthed in New York. Once again, this Court rejected the rule of the place of the wrongful act or omission and held that Spanish law governed the seaman's claims. The Court stated:

> "Discussing the significance of the place of the wrongful act, we pointed out in *Lauritzen* that '[t]he test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts . . .' " 358 U.S. at 383-84.

This Court also held in *Romero* that the rule announced in *Lauritzen* was applicable to maritime cases generally:

> "The broad principles of choice of law and the applicable criteria of selection set forth in *Lauritzen* were intended to guide courts in the application of maritime law generally." 358 U.S. at 382.

Commentators have regarded these two decisions as being among the leading cases in the development of the new conflict of laws approach. The Restatement (Second), Conflict of Laws, cites the *Lauritzen* and *Romero* decisions as examples of the new rule that "rights and liabilities in tort are determined by the local law of the state which has the most significant relationship with the occurrence and with the parties." Restatement (Second), Conflict of Laws § 379, Reporter's Note at 15-16 (Tent. Draft No. 9, 1964).

The fourth edition of Goodrich, Conflict of Laws, relies repeatedly on the *Lauritzen* decision as a leading case in the formulation of the rule "that the law by which the forum is guided in determining the issues in tort cases is that of the state which is most significantly related to the issue . . ." Goodrich, Conflict of Laws, § 92 at 166; see also § 93 at 168 n.16 (4th ed. Scoles 1964).

Like the court below, the Court of Appeals for the Fourth Circuit has recognized in a maritime case that the rule of *Lauritzen* and *Romero* should apply also to domestic conflict of laws questions. In *McClure* v. *United States Lines Co.*, 368 F.2d 197 (4th Cir. 1966), the court stated:

> "*Romero's* approach, however, is not limited to a deferential concern for the interests of foreign powers. The same considerations of paramount interests have overturned established principles for the choice of domestic law. The old dialogue that attributed governance to the laws of the place of the wrong has given way to a new concept of assessment of the relative interests of jurisdictions having contacts with the controversy and the parties. *Lauritzen* and *Romero* were forerunners of a general reapprais-

al and revision of the choice of law rules." 368 F.2d at 201. (Footnotes omitted.)

A similar decision, applying the seven "factors" or "points of contact" of the *Lauritzen* decision to a wrongful death case, is *Symonette Shipyards, Ltd.* v. *Clark,* 365 F.2d 464 (5th Cir. 1966), *cert. denied,* 387 U.S. 908, in which the court held that "the most significant choice of law factor" under the facts of that case was the nationality of the injured and deceased seamen and therefore applied American law, although the injury had occurred on the high seas on a ship registered in the Bahamas and actually owned by a citizen of that country.

This Court's endorsement of the use of an interests and contacts choice of law rule has not been limited to maritime cases. In *Richards* v. *United States,* 369 U.S. 1 (1962), involving actions for deaths in an airplane crash in Missouri allegedly caused by negligent acts occurring in Oklahoma, the Court commented favorably on the tendency of some states to depart from the rule which places sole reliance on the place of the injury "in order to take into account the interests of the State having significant contact with the parties to the litigation." 369 U.S. at 12. In that case the Court adopted an interpretation of the Federal Tort Claims Act which would give effect to the state choice of law rules based upon interests and contacts. The Court rejected the argument that the "law of the place," as used in the Act, referred solely to the internal law of the state in which the negligence occurred, and held instead that the "law of the place" included also the choice of law rules of that state. This interpretation, the Court stated, was appropriate because:

> "Should the States continue this rejection of the older rule in those situations where its application might appear inappropriate or inequitable, the flexibility inherent in our interpretation will also be more in step with that judicial approach, as well as with

the character of the legislation and with the purpose of the Act considered as a whole." 369 U.S. at 13.

Petitioner dismisses the *Lauritzen* and *Romero* cases as not involving a conflict between the laws of two states, but in all but two of the cases cited by petitioner (Pet. 14), the law of the place of the wrong was the only state law relied upon by the parties and hence the only law applied by the court. With the same two exceptions, none of those cases involved a conflict between the laws of two states because only one state had significant contact with the parties and the transaction.

In the only cases which did involve such a conflict, the Court of Appeals for the Sixth Circuit rejected the law of the place of the injury and selected instead the law of the place of registry of the vessel. *Thompson Towing & Wrecking Ass'n* v. *McGregor,* 207 Fed. 209 (6th Cir. 1913); *Patton-Tully Transp. Co.* v. *Turner,* 269 Fed. 334 (6th Cir. 1920).

Petitioner attempts to rationalize the result in these two decisions by arguing that they reflect a "territorial concept" consistent with the law of the place of the injury, even though in both cases the law of the jurisdiction in which the injury occurred had been rejected by the court. The more correct interpretation is that both the *Thompson Towing* and *Patton-Tully* decisions, by giving controlling weight to the jurisdiction of the registry of the vessels involved, anticipate the interests and contacts rule first expressly articulated in the *Lauritzen* decision and now adopted by a constantly increasing number of jurisdictions.

II. THERE IS NO SUBSTANTIAL CONFLICT OF DECISIONS

The conflict between the decision below and certain intermediate New York decisions will shortly be reviewed, and most probably resolved, by the New York Court of Appeals.

As previously discussed in this brief, the decision below is not in conflict with any decisions of this Court or of the federal courts of appeals.

Three other decisions, one in the Southern District of Iowa and two decisions in the New York Appellate Division, explicitly rely on the original opinion of the three-judge panel in the instant case and therefore apply the *lex loci delicti* to claims arising from an aircraft crash in navigable waters.

On closer analysis, however, the conflict represented by those decisions does not justify review by this Court. All three decisions, involving a total of four death actions, arise from the same airplane crash in navigable waters of Lake Michigan within the State of Illinois and involve efforts by the defendants to limit the amount of recovery for maritime tort claims to the $30,000 allowed by the Illinois statutes.

In *Harris* v. *United Air Lines, Inc.*, 275 F. Supp. 431 (S.D. Iowa 1967), the court relied on the original decision of the three-judge panel in the instant case to hold that Iowa law was inapplicable, thus sustaining the Illinois limitation. Subsequent to that decision, the civil action pending in the Southern District of Iowa, Central Division (Civil No. 7-1859-C(2)) was dismissed without prejudice on October 19, 1967 and the claims of that plaintiff are now being asserted only in an action in the New York State courts. In a decision in that New York case, *Harris* v. *United Air Lines, Inc.*, 30 App. Div. 2d 37, 290 N.Y.S.2d 757 (1968), and a companion decision, *Thomas* v. *United Air Lines, Inc.*, 30 App. Div. 2d 32, 290 N.Y.S.

2d 753 (1968), the Appellate Division, First Department, also relied on the original decision of the three-judge panel in the instant case and applied the rule of *lex loci delicti* to govern maritime torts.

Both decisions of the Appellate Division have now been certified by that court for review by the New York Court of Appeals. See 160 N.Y.L.J., issue No. 3 (July 3, 1968), pp. 2, 11.

In choice of law cases decided since *Babcock* v. *Jackson,* 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963), the New York Court of Appeals has employed an approach parallel to that employed by this Court in *Lauritzen* v. *Larsen,* 345 U.S. 571. See Cheatham, "Comments on *Babcock v. Jackson,* a Recent Develoment in Conflict of Laws," 63 Col. L. Rev. 1212, 1229, 1231-32 (1963). In several recent cases, the New York Court of Appeals has reversed lower court decisions which did not give full scope to the interests and contacts choice of law rule announced in the *Babcock* case. *E.g., Miller* v. *Miller,* 22 N.Y.2d 12, 290 N.Y.S.2d 734, 237 N.E.2d 877 (1968); *Macey* v. *Rozbicki,* 18 N.Y.2d 289, 274 N.Y.S.2d 591,221 N.E.2d 380 (1966). In view of the consistent approach taken by the New York Court of Appeals, review by that court of the *Harris* and *Thomas* cases will most probably result in decisions which are consistent not only with the *Lauritzen* decision and other decisions of this Court, but also with the decision of the court *en banc* in the instant case.

The Appellate Division decisions now certified for review by the New York Court of Appeals thus provide no reason for this Court to grant review in the instant case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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